BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
GROCERY HAULERS, INC.,	)	
	)	
Employer,	)	Case No. 3-RC-11944
	)	
and	)	
	)	
TEAMSTERS LOCAL 294	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS and GRAIN MILLERS, LOCAL 50	)	
	)	
Intervenor.	)	

INTERVENOR'S BRIEF

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INTRODUCTORY STATEMENT

Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, Local 50 ("Intervenor" or "Local 50") moves that the Regional Director's March 29, 2010 Decision and Direction of Election in the above-captioned case be vacated and that the Board's November 12, 2009 dismissal of the petition be affirmed.

Local 50 represents the workers of Grocery Haulers, Inc. ("the Employer" or "GHI"), at the Employer's Albany location. Local 50 and GHI have a collective bargaining agreement which was ratified by the members on November 21, 2009. Local 50 represented this same group of workers when they were employed by the predecessor employer, Penske Logistics. It is undisputed that GHI constitutes a "perfectly clear successor" employer.

On November 12, 2009, the Region dismissed a representation petition filed by Teamsters Local 294 ("Local 294" or "Petitioner"). The Petitioner chose not to appeal the dismissal. Instead, on November 27, 2009 the Petitioner filed unfair labor practice charges against GHI and Local 50 alleging that they had violated the Act by negotiating and signing an agreement prior to opening the Albany facility. On January 5, 2010, the Petitioner filed a second representation petition, which it later withdrew. On January 20, 2010, the Regional Director dismissed the Petitioner's unfair labor charges, finding that GHI was a "perfectly clear successor" and that Local 50 had "unrebutted majority status."

It was not until January 22, 2010, more than two months after the dismissal of the first representation petition, that the Petitioner requested reconsideration, citing the alleged discovery of new evidence. On February 9, 2010, the Regional Director reinstated the petition on the basis of this

"new evidence." A representation hearing was held on February 22, 2010. On March 29, 2010, the Regional Director issued her Decision and Direction of Election. On June 9, 2010, the Board granted the Intervenor's Request for Review.

The Regional Director was right to dismiss Local 294's petition and should not have belatedly reopened the matter. It is undisputed that GHI is a "perfectly clear successor" employer. Local 50, which has unrebutted majority status, has negotiated a contract with GHI that has been ratified by its' members. It is an abuse of the Regional Director's authority to undermine the stability of the bargaining relationship by ordering a representation election.

The Regional Director cites MV Transportation, 337 NLRB 770 (2002), as precedent to order an election. While the Intervenor believes that even under MV Transportation the Decision should be vacated, this situation illustrates why that case should be overturned and the "successor bar" doctrine articulated in St. Elizabeth Manor, 329 NLRB 341 (1999), should be reinstated. If the Board does not reconsider or modify MV Transportation, its holding should not be extended to a "perfectly clear" successor situation.

FACTS

For decades, Local 50 has represented workers at the Freihofer's Bakery in Albany, New York. Fifteen years ago, Freihofer's subcontracted its delivery operation to Penske Logistics. Shortly thereafter, Local 50 organized the drivers. Local 50 and Freihofer's negotiated a series of collective bargaining agreements. The last agreement was concluded and ratified in the summer of 2009, and was scheduled to run from June 2009 to May 2012. (Tr. at 106-107; Intervenor Ex. 4.)

In the fall of 2009, after Local 50 and Penske Logistics had completed and ratified their successor collective bargaining agreement, Penske advised Local 50 that it had lost the delivery contract. (Tr. at 107.) Soon after, the Penske drivers and Local 50 learned that GHI would assume the delivery work. (Tr. at 108.)

During October and November of 2009, after Penske lost the delivery contract and before GHI commenced operations, Teamsters Local 294 attempted to organize the Freihofer's facility. Local 294's organizing campaign was led by Secretary-Treasurer Kevin Hunter and Union Representative Rocco Losavio at the direction of principal officer John Bulgaro. (Tr. at 68.) During this period, Hunter and Losavio held four meetings with Penske workers. (Tr. at 76, lines 1-2.) At these organizing meetings, Penske workers would inform Hunter and Losavio as to what was going on at the facility (Tr. at 76, lines 3-6.) Based on what employees told him at these meetings, Hunter testified that he "assumed" that Local 50 was going to seek to negotiate a contract with GHI. (Tr. at 18-20.)

On October 8, 2009, Mr. Hunter of Local 294 wrote Mark Jacobson of GHI to propose that Local 294 organize GHI workers at the Freihofer facility. (Pet. Ex. 1.)

On October 13, 2009, GHI officials and Local 50 representatives met with the approximately

seventy Penske drivers. (Tr. at 110.) The Penske drivers were given applications for employment with GHI. (Tr. at 110; Tr. at 128) Local 50 President Joyce Alston told drivers that GHI and Local 50 would be setting negotiation dates soon. (Id.)

Immediately after this meeting, Local 294 held a meeting at their union hall with approximately thirty of the Penske drivers. (Intervenor Ex. 1; Tr. at 65-66; Tr. at 78, lines 13-16, 17-22; Tr. at 99-100.) The meeting was chaired by Kevin Hunter and Rocco Losavio. (Tr. at 104, lines 11-14.) Penske drivers told Mr. Hunter about what had occurred at the earlier meeting with officials of GHI and Local 50. (Tr. at 66-67.) The drivers told Hunter that representatives of GHI and Local 50 had been at the meeting. (Tr. at 79, lines 20-22.) They told him that they had been given employment applications. (Tr. at 79, lines 1-4; Tr. at 81, lines 2-7; Tr. at 83, lines 5-12.) They told him that Local 50 officials had said they were going to speak to drivers in order to gather contract proposals to take to GHI. (Tr. at 66, lines 11-14.) Hunter was aware from his own experience negotiating contracts that collecting suggestions from employees was an important first step in contract negotiations. (Tr. at 67, lines 2-9.)

Subsequent to the October 13 meeting, Local 50 representatives began soliciting bargaining demands from the Penske drivers, including those who were on the Local 294 Organizing Committee. (Tr. at 129, lines 3-14.)

On October 20, 2009, Mr. Hunter wrote Marc Jacobs of GHI again, demanding that GHI recognize Local 294. (Jt. Ex. 1, Tab G.) His letter stated, "I have had a number of meetings with the present employees of Penske Logistics, Inc. Those employees have explained that they have submitted applications for employment with GHI and are in the process of being tested for those positions." (Id.) On October 21, 2009, Mr. Jacobs responded by letter, stating that "the group of

employees now transporting goods from the Albany Freihofer's plant is, as I suspect you know, represented by Local 50 BCT." (Petitioner's Ex. 4.)

On October 22, 2009, GHI began to extend conditional offers of employment (subject to drug and alcohol testing and a DOT physical) to Penske drivers who had been classified as full-time employees. (*See* Jt. Ex. 1, Tab A.) The letter notifying employees of their contingent hiring also stated "As noted previously, we will be discussing with your union the changes we would like to make to the terms and conditions of your employment and we anticipate beginning these discussions shortly." (Id.)

On October 27, 2009, Local 50 informed GHI that a majority of the former Penske employees who were offered employment by GHI had expressed a desire to remain represented by Local 50, and asked to start bargaining. (Jt. Ex. 1, Tab B.) On October 29, 2009, GHI wrote Local 50 advising that it had already offered employment to forty-one of the Penske drivers represented by Local 50 and proposing that bargaining between GHI and Local 50 commence on November 4 and 5, 2009. (Jt. Ex. 1, Tab C.)

On November 2, 2009, Mr. Hunter of Local 294 wrote Local 50 with a list of twenty-six Penske drivers who Local 294 claimed were part of a Local 294 Organizing Committee. (Petitioner's Ex. 2.)

On November 3, 2009, Mr. Hunter wrote Mr. Jacobson of GHI demanding that the Employer recognize Local 294 as the representative of its employees. (Petitioner's Ex. 3.) That same day, Local 294 filed a representation petition with the Board to represent "all full-time, part-time and casual drivers, switchers and yardmen employed by GHI at the Albany, NY Domicile." (Jt. Ex. 1, Tab D.)

That week, Local 50 circulated a petition among Penske employees affirming their support

for Local 50. It was signed by a majority of the drivers. (Tr. at 113, 135-136.)

Negotiations between Local 50 and GHI began on November 4, 2009 and continued on November 5. (Tr. at 52, lines 7-9.) After the negotiating sessions, Local 50 representatives informed Penske drivers, including members of the Local 294 Organizing Committee, of the progress in negotiations. (Tr. at 130-131, 135.)

On November 9, 2009, counsel for the Employer, in response to a request from Region 3, advised the Board that GHI had not yet commenced operations at the Freihofer location. (Jt. Ex. 1, Tab E.) On November 10, 2009, Mr. Sabin of GHI provided an affidavit to the Board stating that the Employer would not commence operations at the Freihofer location until December 23, 2009 and that no Albany-based drivers would become employees of GHI until that time. (Jt. Ex. 1, Tab F.) The affidavit stated that employment applications had been given to Penske drivers and that conditional employment offers had already been made to approximately fifty drivers. (Id.)

On November 12, Mr. Hunter of Local 294 wrote Mr. Jacobson of GHI, stating as follows:

> "Information has recently come to our Local's attention to the effect that your organization may currently be in the process of negotiating a collective bargaining agreement with Bakery Workers Local 50 for the business operation which your company will be starting in the near future for Freihofer in the Albany, NY area… [O]ur local will do everything within its power to make sure that a collective bargaining agreement is not imposed… in the manner which is apparently currently happening."

(Jt. Ex. 1, Tab H.)

Hunter testified that he had received this information from Teamster supporters working at Penske. (Tr. at 60-61; Tr. at 84, lines 3-6, 15-18.) Hunter sent a copy of this letter to NLRB Region

3. (Tr. at 85, lines 20-24.)

On November 12, 2009, the Acting Regional Director dismissed Local 294's petition as untimely because GHI had not yet commenced operations. The dismissal letter advised Local 294 that it could seek Board review by filing a request with the Board's Executive Secretary within fifteen days. (Jt. Ex. 1, Tab I.) Local 294 did not file an appeal of the dismissal. (Tr. at 92, lines 15-20.)

On November 13, 2009, counsel for GHI responded to Local 294, declining to recognize Local 294 and stating "you are aware that the Bakery Workers currently are the duly certified bargaining representative of the Albany drivers" (Er. Ex. 2.)

Negotiations between Local 50 and GHI continued on November 16 and 17, 2009. (Tr. at 52, lines 7-9, 23-25; Tr. at 53, line 1.) During the week of November 16, 2009, Local 50 circulated a notice to Penske drivers at the Freihofer's location advising that there would be a membership meeting that Saturday, November 21, in order to vote on a contract. (Intervenor Ex. 2; Tr. at 114, 131-132.) The meeting agenda was listed on the flyer as "General Meeting and Contract Ratification!!!" (Intervenor Ex. 2.)

Local 294 Representative Rocco Losavio made arrangements to set up the Local 294 tractor trailer in front of hotel were the ratification meeting would be taking place. (Tr. at 73, lines 1-5.) Mr. Hunter of Local 294 testified that there was "no question" in his mind that the tentative collective bargaining agreement would be voted on at this meeting. (Tr. at 97, lines 15-22.)

On November 18 and 19, 2009, three separate requests were faxed to Local 50 from the Local 294 fax machine, in which Penske employees stated, "I, [name], am requesting a copy of the proposed Collective Bargaining Agreement between Grocery Haulers, Inc., and BCTGM Local 50

for my review prior to the ratification meeting scheduled on Saturday, November 21st, 2009." (Intervenor Ex. 3; Tr. at 95, lines 11-14.) Mr. Hunter testified that he had encouraged workers to send these faxes. (Tr. at 74, lines 15-17; Tr. at 75, lines 3-5.)

On November 20, 2009, Local 50 and GHI finalized a tentative agreement. (Tr. at 53, lines 2-4; Jt. Intervenor Ex. 4.) On November 21, 2009, Local 50 held a meeting at which the draft agreement was submitted for approval by the Penske drivers who had been offered work by GHI. (Tr. at 114-116.) Local 294 brought the Teamster tractor-trailer to the meeting location and set it up in the parking lot outside. (Tr. at 115.) Local 294 representatives also handed out leaflets regarding the contract vote. (Id.)

The prospective employees approved the agreement by a vote of 33 to 21. (Tr. at 116.)

On November 27, 2009, Local 294 filed unfair labor practice charges (dated and signed November 24, 2009) against Local 50 and GHI. (Jt. Ex. 1, Tabs K and L.)

The charges against the Employer allege that GHI "rendered unlawful assistance to Local 50 by negotiating and entering into a collective bargaining agreement with Local 50 at the 'Freihofers' prior to GHI hiring employees and prior to GHI assuming operations." (Jt. Ex. 1, Tab K.)

The charge against Local 50 alleges that Local 50 violated the Act by "negotiating and entering into a collective bargaining agreement for the prospective terminal servicing the Freihofer Albany facility, notwithstanding that GHI has yet to hire employees or commence operations." (Jt. Exh. 1, Tab L.)

On that same day, November 27, 2009, the fifteen-day period which Local 294 had under Board regulations in which to file an appeal of the dismissal of its representation period expired. Local 294 did not file an appeal or request an extension of time. (Tr. at 92, lines 15-20.)

On December 23, 2009, GHI began operations at the Freihofer facility. Since then, Local 50 has continued to represent the drivers. (Tr. at 116.)

On January 5, 2010, Local 294 filed a second petition for certification, which it later withdrew. (*See* Case No. 3-RC-11955.)

On January 20, 2010, the Board dismissed the unfair labor practice charges filed against Local 50 and GHI by the Petitioner. (Jt. Ex. 1, Tab M.) The Board found that that "it is undisputed that the Employer was a perfectly clear successor to Penske Logistics" and "therefore, it was lawfully permitted to recognize Local 50 and negotiate with it even prior to the assumption of operations in December 2009… Local 50 enjoyed an unrebutted presumption of continued majority support and the Employer did not violate the Act by continuing to recognize Local 50 and concluding negotiations on a new contract with it." (Id.) The Board reiterated that "Local 50 enjoyed a rebuttable presumption of majority support and that presumption was never rebutted. Therefore, it did not violate the statute by accepting recognition and negotiating a collective bargaining agreement." (Id.)

On January 22, 2010, two months after the deadline for filing an appeal of the dismissal of their first petition, the Petitioner requested reconsideration. (*See* Jt. Ex. 1.) Petitioner's counsel stated that the extreme lateness of this request was justified because "in the course of the investigation of the second Petition for Certification, as well as the investigation surrounding all of the succeeding unfair labor practice charges filed by my client since the dismissal of the first petition, a number of facts have come to light… *This request could not be made earlier for the simple reason that none of the facts subsequently discovered and described above were known to the Petitioner, and apparently to the Board, within the time period for the filing of an appeal of the Regional Director's decision to dismiss the Petition."* (Id., emphasis added.)

These facts, which Local 294 alleges it was unaware of as of November 27, 2009 (the deadline for filing an appeal), are as follows:

> (1) "within a couple of days after filing the first petition for certification (and well before its dismissal), the Employer and representatives of Local 50 met and began negotiations for a collective bargaining agreement to take effect on or after December 23, 2009;"
>
> (2) "the Employer recognized Local 50 either before or during the period between the filing of the first petition and its dismissal, as the Representative of the employees to be employed by the employer on and after December 23, 2009;"
>
> (3) "the Employer, prior to the filing of the first petition began interviewing current employees of Penske Logistics, Inc., and began handing out and receiving back completed application forms, began scheduling road tests for such individuals, and may have made conditional offers of employment."

(Id.)

On February 9, 2010, the Regional Director granted Local 294's request, stating that "in light of the Petitioner's submission, and based upon evidence adduced by the investigation of the unfair labor practice charges filed in Cases 3-CA-27447 and 3-CB-9045, it is apparent that certain significant facts were not presented to the Region during its administrative investigation of the petition and therefore, were not considered by the Region at the time of the original determination to administratively dismiss the petition." (Id.)

On March 29, 2010, the Regional Director issued her Decision and Direction of Election. On June 9, 2010, the Board granted the Intervenor's Request for Review.

ARGUMENT

A. The Regional Director Abused Her Discretion in Granting the Petitioner's Untimely Motion for Reconsideration

The Petitioner's Motion for Reconsideration is clearly untimely. The petition was dismissed on November 12, 2009. It is undisputed that Local 294 never exercised its right to file an appeal of the dismissal. (Decision at 15.) it was not until January 22, 2010, two months after the deadline for filing an appeal, that Local 294 requested reconsideration, citing the alleged discovery of new evidence. (*See* Jt. Ex. 1.)

Regional Directors do not have unfettered discretion to reopen decided representation cases. The Board will review such decisions to determine whether the Director "has not abused his [or her] authority." Air Lacarte, Florida, Inc., 212 NLRB 764, fn. 9. The Regional Director has abused that discretion in granting the Petitioner's untimely Motion for Reconsideration based on "new evidence," which was actually in possession of both the Petitioner and the Region at the time the petition was dismissed and during the period for filing an appeal.

The two cases cited by the Regional Director as precedent for the decision to grant reconsideration of the petition, Air Lacarte, Florida, Inc., 212 NLRB 764 (1974), and Delto Company, Ltd. d/b/a/ Cabrillo Lanes, 202 NLRB 921 (1973), differ radically from the present case. In both those cases, petitions were reinstated after it was discovered that parties had engaged in blatant falsification. In Air Lacarte, a criminal trial that occurred subsequent to the Board's dismissal of an election petition revealed that the Intervenor Union had falsified the date on which a collective bargaining agreement was signed and given false testimony to the Board at the representation hearing, in order to claim a contract bar. 212 NLRB 764, 764-765. In Cabrillo Lanes,

reconsideration was granted when new evidence was produced that a second signed contract, with different provisions regarding automatic renewal, existed between the Employer and the Intervenor Union, thereby calling into question the existence of a contract bar. 202 NLRB 921, 921-923.

No such wrongdoing exists in this case, nor has it been alleged by the Region. Instead, the Decision insinuates that the Board was misled by the Employer, without offering any supporting evidence. (*See* Decision at 9, 19.)

The record shows that on November 10, 2009, pursuant to a request by the Region, Employer representative Jay Sabin provided an affidavit which stated that GHI would assume operations at the Albany facility on December 23, 2009, that contingent offers of employment had been made to fifty drivers, and that there would be no drivers on GHI payroll before December 23, 2009. (Jt. Ex. 1, Ex. F.) It is not alleged that Mr. Sabin lied to the Board, or did not truthfully answer any questions put to him. Instead, it appears that the Region believes Mr. Sabin had an affirmative obligation to explicitly declare—without any solicitation by the Board—that GHI had recognized Local 50 and that the Employer and the union were engaged in collective bargaining. (*See* Decision at 9.) These are facts which Mr. Sabin knew Local 294 was well aware of, and could reasonably assume were known by the Region.

Regarding the Director's discretion to find the late-filed motion timely, the Decision states, "In Air Lacarte, the Board allowed the new evidence to be heard where the Petitioner's motion for reconsideration was filed approximately two months after its discovery." (Decision at 20.) This description of the facts in Air Lacarte is misleading. As stated by the Board in that case, "We find no merit in the Intervenor's contention that… the motion, based upon newly discovered evidence, was not filed promptly on discovery of such evidence as required by Sec 102.65(e)(2) of the Board's

Rules and Regulations. Although Krause was found guilty by a jury on October 20, 1973, and Petitioner did not file its petition for revocation until December 5, 1973, *the actual written verdict and sentence was not issued until December 27, 1973.*" 212 NLRB 764, fn. 5, emphasis added. In short, the Board did not find that there was a two month delay in filing the Motion for Reconsideration, because the verdict and sentence affirming the "new evidence" had yet to be issued.

No such extenuating circumstances exist in the present case. As discussed herein, Local 294 was well-aware since at least October—three months before it filed its request for reconsideration—that GHI had recognized and was bargaining with Local 50. Air Lacarte does not provide precedent for a Petitioner which believes it has important evidence to sit on its hands for three months before taking any action.

B. The Decision Contains Clearly Erroneous and Prejudicial Findings Regarding When the Petitioner and the Region Learned of the "New Evidence" Cited as the Basis for Reconsideration

The Regional Director's Decision sets forth the following reasons for finding the Petitioner's Motion for Reconsideration timely despite its late filing:

> "Prior to the Region's dismissal of the petition, I was not aware that the Employer had granted recognition to the Intervenor and negotiations were ongoing between them; nor had the Employer notified the Petitioner that it had granted recognition to the Intervenor and begun negotiations. In addition, the October 21 and November 13 letter from the Employer and its counsel, respectively, did not inform the Petitioner that the Employer was engaged in negotiations with the Intervenor. *The record revealed that the Petitioner obtained knowledge of the Employer's recognition of the Intervenor, on or after November 13. It was on or about November 15 that the Petitioner obtained knowledge of the Employer's negotiations with*

the Intervenor."

(Decision at 19-20, emphasis added.)

To the contrary, the evidence establishes that Local 294 was aware as early as October 13, 2009 that GHI had recognized Local 50 and that the parties were entering into collective bargaining. The evidence also establishes that Local 294 provided this information to the Region on November 12, 2009, the same day that the Regional Director dismissed Local 294's petition. These facts were certainly known by Local 294 as of November 27, 2009, the deadline for filing an appeal of the petition dismissal.

On October 13, 2009, GHI officials and Local 50 representatives met with approximately seventy Penske drivers. (Tr. at 110.) Immediately after this meeting, Local 294 held a meeting at their union hall where approximately 30 Penske drivers met with Local 294's Secretary-Treasurer, Kevin Hunter. (Intervenor Ex. 1; Tr. at 65-66; Tr. at 78, lines 13-16, 17-22; Tr. at 99-100.) Mr. Hunter testified that Penske drivers told him what had occurred at the earlier meeting held that same day. (Tr. at 66-67). Mr. Hunter testified that the Penske drivers told him they had been given GHI employment applications. (Tr. at 79, lines 1-4; Tr. at 81, lines 2-7; Tr. at 83, lines 5-12.) They told him that GHI and Local 50 would be setting negotiation dates soon. They told him that Local 50 was gathering contract proposals to take to GHI. (Tr. at 66, lines 11-14; Tr. at 67, lines 2-9; Tr. at 110, 128.) Mr. Hunter testified that he was aware from his own experience negotiating contracts that this was an important first step in contract negotiations. (Tr. at 67, lines 2-9.) Thus, the Petitioner was aware as of at least October 13 that GHI and Local 50 were entering into negotiations.

On October 20, 2009, Mr. Hunter wrote Mr. Jacobs of GHI demanding that the Employer

recognize Local 294. (Jt. Ex. 1, Tab G.) His letter stated, "I have had a number of meetings with the present employees of Penske Logistics, Inc. Those employees have explained that they have submitted applications for employment with GHI and are in the process of being tested for those positions." (Id.) On October 21, 2009, Mr. Jacobs responded by letter, rejecting Mr. Hunter's overtures and stating that "the group of employees now transporting goods from the Albany Freihofer's plant is, as I suspect you know, represented by Local 50 BCT." (Petitioner's Ex. 4.) Thus, as of October 21, the Petitioner had written notice that GHI recognized Local 50 as the representative of its future employees.

On October 22, GHI began extending written conditional offers of employment. (*See* Jt. Ex. 1, Tab A.) These written offers were given to forty-one drivers that week, including drivers that Local 294 claimed were part of their organizing committee. (*See* Jt. Ex. 1, Tab C; Petitioner's Ex. 2.) The letter notifying employees of their contingent hiring also stated "As noted previously, we will be discussing with your union the changes we would like to make to the terms and conditions of your employment and we anticipate beginning these discussions shortly." (Id.) Thus, by October 22, the employees who the Petitioner claimed were on its Negotiating Committee had written notice, which they presumably shared with Mr. Hunter, that GHI was entering into negotiations with Local 50.

As stated in the Director's decision, "On November 12, the Petitioner sent a letter to Jacobson [Mark Jacobson of GHI] stating that *it had recently come to the Petitioner's attention that the Employer was in the process of negotiating a collective bargaining agreement with the Intervenor for the business operations which the Employer would be starting in the near future at the Freihofer facility*... The Petitioner advised the employer of its position that any negotiations it may be having with the Intervenor are contrary to labor law and that the Petitioner was prepared to do

everything within its power to ensure that a collective bargaining agreement was not imposed on its employees." (Decision at 10.) This letter constitutes a written admission by the Petitioner that it was aware of these facts as of at least November 12, 2009.

In addition, "Hunter testified that he sent a copy of Petitioner's November 12 letter to the Region." (Decision at 10, Tr. at 85, lines 20-24.) *Therefore, on the same day that Board dismissed the petition, it was made aware of the negotiations between Local 50 and GHI.*

On November 13, 2009, counsel for GHI responded to Local 294, declining to recognize Local 294 and stating "you are aware that the Bakery Workers currently are the duly certified bargaining representative of the Albany drivers" (Er. Ex. 2.) This confirmed yet again that GHI recognized Local 50 as the certified bargaining representative.

Ignoring this mountain of evidence, the Regional Director instead finds that "the Petitioner obtained knowledge of the Employer's recognition of the Intervenor, on or after November 13... [and] it was on or about November 15 that the Petitioner obtained knowledge of the Employer's negotiations with the Intervenor." All of the Petitioner's earlier efforts to stop the negotiation of a contract between GHI and Local 50 are found irrelevant to imputing knowledge of the underlying facts, simply because Mr. Hunter testified that was acting on "rumors." (Decision at 10.) This is manifestly unreasonable. Apparently, the knowledge that the Petitioner had was sufficient to file unfair labor practice charges against both GHI and Local 50, and to threaten legal action against the Employer, but somehow not sufficient to file an appeal of the petition's dismissal.

Assuming *arguendo* that Local 294 did not learn these facts until the dates stated in the Director's Decision, November 13 and 15, the Petitioner *still had two weeks to file an appeal* of petition dismissal before the November 27 deadline. It did not.

Local 294 chose a different legal strategy. Instead of filing an appeal of the petition's dismissal, on November 27—the same day that appeals were due—Local 294 filed unfair labor practice charges against GHI and Local 50. (Jt. Ex. 1, Tabs K and L.) Ironically, the basis of the charges are that GHI and Local 50 were "negotiating and entering into a collective bargaining agreement for the prospective terminal servicing the Freihofer Albany facility," the very facts which the Region claims both it and the Petitioner were unaware of at the time. (Jt. Ex. 1, Tabs K and L.) Two months later, the Petitioner would claim that this was "new evidence" justifying a Motion for Reconsideration.

C. Assuming that MV Transportation is Applicable to this Case, Its Holding is Misconstrued

The stated purpose behind the Board's decision in MV Transportation was to protect employee free choice. GHI employees reaffirmed their commitment to the incumbent at the time of the 2009 negotiations with the predecessor employer, Penske Logistics, and again when they ratified the new agreement between the incumbent union and the successor employer. Contrary to MV Transportation, the Decision abrogates employees' free choice and disrupts an established bargaining relationship.

If MV Transportation is found to cover a perfectly-clear successor situation, then it at least requires a showing that the presumption of the incumbent union's exclusive representational status has been rebutted. Here no such evidence exists. In fact, it was on that basis that the RD dismissed the unfair labor practice charges filed by the Petitioner in Cases 3-CA-27447 and 3-CB-9045. As stated in the Decision,

> "The investigation of the charges had revealed that, during the period subsequent to the filing of the instant petition on November 3 and prior to the dismissal of the petition on November 12, the Intervenor had solicited unit employees to sign a petition in support of it as their collective-bargaining representative. Certain of the individuals who signed the Intervenor's showing of support had also previously signed the Petitioner's showing of support, thereby nullifying their selection of the Petitioner as their representative under Board law, in a number sufficient to effect majority status. *Thus, I found that the Intervenor enjoyed an unrebutted presumption of continued majority support* as of a date subsequent to the filing of the petition, when the Intervenor reestablished its majority status."

(Decision at 13-14, emphasis added.)

The Decision inexplicably ignores this fact, choosing instead to focus on a brief window of time between November 3, when the petition was filed, and sometime before November 12, when the Region found that the Intervenor had regained unrebutted majority status. Based on this slim reed, the Region seeks to impose a representation election on a workforce that ratified a contract with the predecessor employer in the summer of 2009, affirmed its majority support for its bargaining representative in early November of 2009, ratified a collective bargaining agreement with the successor employer, and has implemented that contract for almost a year now. This does not represent a balance between "the compelling statutory policies" of "protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other." MV Transportation, 337 NLRB 770, 770.

D. The Petition is Barred By the Contract In Effect Between GHI and Local 50

The present facts closely parallel those of Road & Rail Services and IBT Local 604, 348 NLRB 1160 (2006), in which the Board found that a "perfectly clear successor" employer did not

violate Section 8(a)(2) and (3) of the Act by recognizing the incumbent union and entering into a collective bargaining agreement prior to the hiring of the Respondent's work force and the commencement of its operations. The Board noted in its decision that at no time was there evidence that the union had lost its majority status. In the present case, the Director finds that for a period of at most nine days, there was a question regarding whether the incumbent union had majority status. However, by November 12 at the latest the union had regained unrebutted majority status. GHI and Local 50 continued negotiations and the workers ratified an agreement.

The petition should be dismissed because the "perfectly clear successor" employer has recognized the incumbent union, which has unrebutted majority status, and a contract bar now exists. The Petitioner could have filed a representation petition in summer of 2009, when Local 50's contract with the predecessor employer expired, but chose not to do so. It should not be allowed to belatedly disrupt the bargaining relationship between the parties to a valid collective bargaining agreement.

E. The Decision Imposes Obligations on a "Perfectly-Clear Successor" Employer and Incumbent Union that Have No Basis in the Act or in Case Law

The Decision strongly implies that GHI had numerous affirmative obligations to contact the Board and the Petitioner and inform them in unambiguous language that the Employer had recognized Local 50 and that the parties were engaged in collective bargaining. (*See* Decision at 9, 19.) Ignoring the ample evidence that Local 294 was aware of all the relevant facts, the Decision shifts the burden to the Employer to reach out to Local 294. (Decision at 19.) The Motion for Reconsideration is found timely because the Employer, in its October 21 and November 13 letters to

the Petitioner, did not explicitly say that it was engaged in negotiations with Local 50 (Id.) But there is no precedent holding that a successor employer has such an obligation to a Petitioner that seeks to supplant the union which represents workers of the predecessor employer.

Nevertheless, GHI's letters to the Petitioner *did* put the Petitioner on notice that the Employer recognized Local 50 as the collective bargaining representative. The October 21 letter from Mr. Jacobs of GHI to Mr. Hunter of Local 294 stated that, "the group of employees now transporting goods from the Albany Freihofer's plant is, as I suspect you know, represented by Local 50 BCT." (Petitioner's Ex. 4.) And as described in the Director's decision, "On November 13, the Employer's attorney sent a letter to the Petitioner setting forth the Employer's position that the Intervenor was the current duly-certified collective bargaining representative of the Albany drivers and that until an election was held and another union was certified by the NLRB, the Intervenor would continue as the bargaining representative of the Albany drivers." (Decision at 11.) It remains unclear just what sort of an unambiguous statement the Region would require a "perfectly-clear successor" employer to give an intervening union.

The Decision implies that GHI had an affirmative obligation to request that the Petitioner allow it to review the originals of the signed petition it had. (Decision at 28.) And it is implied that under Levitz Furniture Co., 333 NLRB 717 (2001), GHI had an obligation to file an RM petition. (Decision at fn. 12.) To the contrary, Levitz simply outlines the circumstances under which an employer *may* file an RM petition. It is another matter entirely to *oblige* an employer to file an RM petition, or to investigate the claims of a Petitioner seeking to oust the recognized bargaining representative.

The broader implication of the Regional Director's Decision is that once the Petitioner

demanded recognition, the Employer should have ceased bargaining with the legally recognized union until the representation issue was clarified. The Decision finds that the Petitioner raised a question regarding the Intervenor's majority status on November 3. (Decision at 28.) Negotiations with Local 50 were set to begin on the very next day, November 4. (Decision at 8.) Presumably, the Region believes the Employer should have suspended contract negotiations on one day's notice, until the representation issue was resolved. But nothing in Levitz supports this proposition. In fact, under Levitz, GHI would have committed an 8(a)(5) violation if it refused to bargain with Local 50 based on the Petitioner's claim of majority status. "Nothing in the Act indicates that an employer's uncertainties or beliefs concerning majority status—whether or not held in good faith—have any relevance to its bargaining obligation under Sections 8(a)(5) and 9(a) of the Act." 333 NLRB 717, 724.

F. The Board Should Overturn MV Transportation and Reinstate the "Successor Bar" Doctrine Articulated in St. Elizabeth Manor

The present case serves to illustrate how MV Transportation neither advances employee free choice nor supports the stability of the bargaining relationship. GHI employees have repeatedly affirmed their support for Local 50. They ratified a collective bargaining agreement with the predecessor employer in the summer of 2009, signed petitions expressing majority support for the union in early November of 2009, and ratified a collective bargaining agreement with the successor employer in late November of 2009. Yet, because a raiding union produced a petition showing that for a miniscule window of time—at most nine days—majority support for Local 50 waned, the Region, citing MV Transportation, has ordered a representation election. This misguided action

undermines the stability of the bargaining relationship at a worksite where a valid collective bargaining agreement has been in place for nearly a year now.

In St Elizabeth Manor, 329 NLRB 341, the Board described the tumult surrounding a change in employer. "[A]lthough at the time of transition there may be no indication that the employees had become dissatisfied with their union, anxiety about their status under the successor may lead to employee dissatisfaction before the union has had the opportunity to demonstrate its continued effectiveness." *Id.* at 343. This case is a textbook example of that. In summer of 2009, employees ratified a new collective bargaining agreement. A few months later, a new employer came in. During this tumult, a raiding union was able to exploit employee anxieties. Days later, when employees saw the effectiveness of their union in dealing with the new employer, they reaffirmed their support for Local 50. Under MV Transportation, a less scrupulous employer could have exploited this situation to unilaterally withdraw recognition from the union and avoid bargaining a first contract.

In her dissent in MV Transportation, Board Member Liebman noted that "the rule of St. Elizabeth Manor allows the employer and the incumbent union to bargain without the uncertainty and disruption that might be caused by organizing campaigns, including the effort of a rival union, a potential destabilizing factor." MV Transportation, at 779. The present case illustrates how a raiding union can undermine bargaining stability with a successor employer. The Decision finds that the Petitioner raised a question regarding the Intervenor's majority status on November 3, the day before negotiations were set to start. (Decision at 28.) In light of MV Transportation, the Employer was placed in the position of either refusing to enter into negotiations, thereby committing an 8(a)(5) violation, or commencing negotiations despite the raiding union's claim of majority support, thereby risking 8(a)(1) and (2) violations. It is notable that even in a situation such as this, where the

successor employer recognized the union and bargained a new agreement, the lack of a "successor bar" subsequent to MV Transportation has undermined the stability of collective bargaining.

In her dissent in MV Transportation, Board Member Liebman analogized an insulated period to "a term of office for a public official, who is not required to run for reelection whenever his poll numbers drop." MV Transportation, at 781. This analogy can be taken further. Requiring a representation election during a transition between employers is like requiring a public official to run for reelection at the very moment he enters sensitive negotiations with a foreign government. It serves to distract attention, divert resources, and threaten the results of those negotiations. It severely undermines the stability of bargaining, while not contributing in any meaningful way to "employee free choice."

The Board should overturn MV Transportation, and the key holding of St. Elizabeth Manor should be reasserted:

> "We hold that once a successor's obligation has attached (where the successor had not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition.

St. Elizabeth Manor, at 344.

G. The "Successor Bar" Doctrine Should Be Applied in Situations Involving a "Perfectly Clear" Successor

The Decision states that "there is no dispute that the Employer herein is a perfectly clear successor within the meaning of NLRB v. Burns International Security Services, 406 U.S. 272 (1972). The Board did not specifically address a 'perfectly clear' successor situation in its decision in

MV Transportation." (Decision at 23.) Nevertheless, the Decision goes on to apply MV Transportation. It was an error to expand its scope to the present situation.

If the Board does not overturn MV Transportation, then its holding should not be extended to the "perfectly clear" successor situation. The application of a "successor bar" for a reasonable time would advance both stable bargaining and employee free choice.

CONCLUSION

It is an abuse of the Regional Director's authority to undermine the stability of the bargaining relationship after a perfectly-clear successor employer has negotiated a contract with a union that has unrebutted majority support. On key matters used to justify the reinstatement of the petition, the Regional Director's findings of fact are clearly erroneous. The Petitioner was well aware of all the relevant facts during the time-period for filing an appeal, and contemporaneously provided the Region with both unfair labor practice charges and copies of relevant correspondence. The Petitioner chose to file unfair labor practice charges rather than file an appeal, allowing their time to appeal the dismissal of the petition to expire. The Region dismissed the unfair labor practice charges. The Petitioner should not have been allowed to then belatedly appeal the dismissal of the earlier petition. The collective bargaining agreement between Local 50 and GHI establishes a contract bar to a new representation petition.

This case illustrates why the "successor bar" doctrine articulated in St. Elizabeth Manor, 329 NLRB 341 (1999), should be reinstated. If the Board does not reconsider or modify MV Transportation, its holding should not be extended to a "perfectly clear" successor situation, such as this one. The "successor bar" doctrine should be applied in situations involving a "perfectly clear"

successor.

For these reasons, the Intervenor asks the Board to reverse the Regional Director's Decision and Direction of Election.

Respectfully submitted,

/s/

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Dated: November 1, 2010

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document is being served this day upon the following persons, by electronic mail, at the addresses below:

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